THE CONSTITUTIONS OF THE UNITED STATES AND CANADA

AN ADDRESS

BY

THE HONORABLE WILLIAM RENWICK RIDDELL

L. H. D., ETC.

OF TORONTO (JUSTICE OF THE KING'S BENCH DIV'N, H. C. J., ONT.)

FOR THE

EIGHTEENTH ANNUAL SESSION

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IOWA STATE BAR ASSOCIATION

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The other day, in a train leaving Toronto I overheard an earnest voice saying "But that can't be constitutional—the Supreme Court will upset that." I at once said to myself, "That is an American speaking"—for in my association with citizens of this favoured land, I have found that a great part of their time and the time of their courts is taken up in the discussion of the constitutionality or unconstitutionality of enactments of their legislative bodies.

In Canada, on the other hand, we very seldom find it necessary to mention the Constitution at all. It is a somewhat curious circumstance that two neighbouring peoples of the same origin, the same tongue and religion, kindred aspirations and identical views of justice and right should differ so much in their conception of a constitution; it is I think unparalleled in history. In the ultimate analysis the difference arises from the fact that the fathers of this Union of States knew how to write; and that having the power, they had that desire to reduce their views to a written form which characterizes the philosopher.

In the mother country, the philosophic students of the problems of politics gave written expression from time to time to their views also—but these students differed from those philosophers in that they had no power to cause their writing to be adopted as a binding document. No more profound studies have ever been made in the theory of government and concerning the balance of function of its various departments than those of Englishmen—but Englishmen could give them only as speculations, they had not the power to have their theories adopted by the Nation at large.

The fathers of this Nation, when they had drawn from English and other sources what they conceived to be the true principles upon which government should be carried on, went further and

formulated their theories in a document framed with much skill; and they had the fortune to have that document declared binding upon not only the Nation as it then existed, but also upon the Nation—speaking generally—as it was to be to the end of time. And this is why the words "constitution" and "constitutional" have such different connotations in the two countries.

In the United States the Constitution is a written document containing so many letters and words—and anything which is in accord with that document is constitutional. In England the Constitution is the aggregate of the more or less vague and uncertain principles upon which the affairs of state have been, and therefore should be, administered. For example, in theory the Sovereign has the right to refuse to assent to a bill which has passed both Houses of Parliament. No Sovereign since Queen Anne has ventured to do this—and the theoretical right is dead as Queen Anne herself. No Sovereign would now dream of setting up his will against that of his Parliament—to do so would be unconstitutional. But there are many parts of the Constitution by no means so well-settled. If five years ago a statesman or lawyer had been asked whether the House of Lords could reject a budget passed by the Commons, he would have answered—"The House of Lords no doubt can, but it will not." It was thought by many, if not all, that such an exercise of power by the House of Lords would be as unconstitutional as the refusal of the Sovereign to assent to a bill. And yet we know that the House of Lords did recently assert just such a power—and we have not yet heard the last of the results. Apparently the last fight of entrenched privilege in Britain against the insistent demands of democratic freemen has just been fought. In the old land when the question arises, "Is this proposal constitutional?" the answer cannot be given by reference to a document and if necessary to a court to determine the meaning of the document—but it is the electorate who are asked for the answer.

"Littera scripta manet": the American may say, "I stand upon the letter of the Constitution: let the heathen rage and the people imagine a vain thing."

And does all this not show that the fathers of the Union had not confidence in the wisdom and justice of the people—the elec-

torate? They were not content to leave to the existing or to future generations the power to act contrary to what they—these fathers—thought just and right. If it was not "No doubt but ye are the people and wisdom shall die with you", was it not perilously near to it? The result is that the people of the United States of America are governed, in part indeed, by the Legislatures elected by themselves, but in no small measure by the hand and voice of the dead.

And this is the essence of what is so often made a boast, namely, that its government is a government of law and not of men. Wherever there is a written Constitution limiting the powers of legislative and executive bodies, there must of necessity be a judicial body to interpret the meaning of the Constitution—there must of necessity be a tribunal to determine the meaning of the document in case of dispute—that tribunal could not well be the Legislature or the Executive itself, but it must be a separate tribunal and could only be a court. The absence of such a tribunal means anarchy—the decision as to the limits of its own power under a written Constitution by Legislature or Executive means tyranny, neither of which the Anglo-Saxon can bear.

In our exemplar Britain, the Parliament is absolutely free. "The power of Parliament is so transcendent and absolute that it cannot be confined, either for causes or persons, within any bounds. It has sovereign and uncontrollable authority in the making, confirming, enlarging, restricting, abrogating, repealing, reviving and expounding of laws concerning matters of all possible denominations." This statement of Blackstone (Book 1, at page 160) was cited with approval in a decision of my own which was affirmed by the Judicial Committee of the Privy Council, the ultimate appellate tribunal in the Empire: Florence, &c., v. Cobalt (1908), 18 O. L. R. 275, at p. 279.

"It is a fundamental principle with English lawyers that Parliament can do everything but make a woman a man and a man a woman", says DeLolme. "An Act of Parliament can do no wrong, though it may do several things that look pretty odd", says Sir John Holt, C. J., in City of London v. Wood (1700), 12 Mod. 669, at pp. 687, 688. Sir Edward Coke who advanced the proposition in Bonham's case, 8 Co. 118 (a), that "The common law will control Acts of Parliament, and sometimes ad-

judge them to be utterly void'' was properly rebuked by Lord Ellesmere, Note in Thomas & Fraser's edit. of Coke's Rep., Vol. 4, pp. 376, 377 (see, too, what Coke says as to the Acts of Parliament against natural equity in Co. Litt, sec. 212). ''This dictum once had a real meaning but it never received systematic judicial sanction and is now obsolete. . . . A modern judge would never listen to a barrister who argued that an Act of Parliament was invalid because it was immoral or because it went beyond the limits of parliamentary authority.'' Dicey's Law of the Constitution, 7th Ed., p. 59, note (1), pp. 60, 61. ''The words of the Legislature are the text of the law and must be obeyed'', per Hamilton, J. (1911), 1 K. B. at p. 1101.

Nor is there any definite line of decisions in America before the Revolution in the opposite sense.

No doubt the Colonial Courts in considering the Acts of Parliament of the mother country strove to make what they considered to be right and justice override certain of the statutory provisions. But it cannot, I think, be said that any court in the English Colonies went so far as to say that there was a limit set to the power of the home Parliament by any natural or inherent right.

The South Carolina case of Bowman v. Middleton (1792), 1 Bay 252, did, indeed, decide that an act of the Assembly passed in 1712, which purported to transfer the fee in certain land from the heir-at-law to another, was null and void ''as it was against common right as well as against Magna Charta to take away the freehold of one man and vest it in another.'' But this decision by no means impugned the power of the home Parliament to do what the Colonial Assembly had tried to do; and is simply in substance a decision that the Colonial Assembly had not the power to repeal Magna Charta.

No other case went so far as to declare any statutes invalid as against natural right—although, indeed, there are many *obiter dicta* which indicate that certain very learned judges held the opinion attributed to Coke. In the case of Winthrop v. Lechmere, in 1727-8 mentioned in Thayer, pp. 34 sqq., their Lordships of the Privy Council advised His Majesty to declare an act of the Assembly of the Colony of Connecticut in respect of land of intestates null and void as against the common law of England, but that was to be an exercise of royal prerogative.

The act (30-31, Vic. c. 3) which constituted the Dominion of Canada has in the preamble the following:—"Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdoms of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom". This preamble correctly sets out the desire of the British North American Provinces and correctly indicates the result of the British North America Act. Our Constitution *is* similar in principle to that of the United Kingdom.

It is true that there are modifications—as there must needs be where more than one body is intended to legislate with absolute authority within the same territory. The Dominion Parliament was intended to have unlimited power (in respect of certain matters) within Canada generally; the Provincial Legislature unlimited power (in respect of certain other matters) within the particular Province. The determination of objects of legislation of Dominion and Province must, of course, be in writing; the division appears in sections 91 and 92 of the British North America Act. To this extent there is a written Constitution for the Dominion of Canada and the courts have been called upon to interpret the British North America Act and thereby to determine the power of Dominion or Province to legislate in respect of some specific matter.

It has been said by an American writer that in Canada the word "unconstitutional" has a meaning corresponding to its use in the United States. This is an error. We use the word in the same sense and with the same connotation as in the Old Land. Careful speakers and writers use the phrase "ultra vires" for "unconstitutional" in its American meaning; "intra vires" for "constitutional".

But while the Dominion and the Province have a restricted list of subjects upon which they may legislate, and they can do nothing outside these limits so set, still when acting within these limits they have "plenary powers of legislation as large and of the same nature as those of Parliament itself." So said the Judicial Committee in Reg. v. Borah (1878), 3 A. C. 889, at p. 904. Within the limits of subjects and area the Legislatures are supreme and have "the same authority as the Imperial Parlia-

ment." Hodge v. Reg. (1883), 9 A. C. 117, 132. In a judgment in Smith v. London (1909), 20 O. L. R. 133, at p. 137, I put it thus:—"The powers of the Legislature of the Province are the same in intension though not in extension as those of the Imperial Parliament. The Legislature is limited in the territory in which it may legislate, and in the subjects: the Imperial Parliament is not—that is the whole difference."

And, where the particular subject of legislation is not mentioned in the lists, the Dominion has the power—the residual legislative power, which in the United States rests in the States, is in Canada in the Dominion.

Before speaking of special acts of legislation, I might be allowed to say a word or two as to the Executive.

The head of the United States is elected from time to time. His powers are analogous to those possessed many years ago by the King. He selects his own ministers, and they are his ministers subject to dismissal at his will—it is his policy which they must carry out and they may safely defy public opinion so long as they have his approval. In Canada the head of the State is the Governor-General, or in the Province the Lieutenant-Governor, representing the King; he must, however, take such ministers as the Parliaments say—the ministers must have the confidence of Parliament and the approval of the Governor is as naught compared with that of the House. The King, i. e., the King's representative, must carry on the affairs of the country through ministers, and he can do nothing himself. If he would dismiss a minister he must find some other minister who will take the responsibility of advising this dismissal and obtain the support of the House in such advice—or if he cannot obtain the support of the House, he must be able to obtain the support of a new House upon an appeal to the country. We do not have the fixed and set periods for the election of our legislators which are characteristic of the United States system. Whenever it is thought advisable by the government of the day to take the opinion of the electorate, the Governor-General or Lieutenant-Governor, as the case may be, will direct an election—or if he refuses to direct an election, he must find an administration who will take the responsibility of advising refusal—and such administration must find support in the existing House—or upon

an election, if that administration goes to the country. It is true that the life of a Parliament is in Canada limited to five or (in the Province) four years—but that is by a statute of Parliament itself, and the same Parliament may extend or shorten the period. It is seldom that any Parliament lives out its statutory life—generally a favourable opportunity offers to take the opinion of the electorate on some more or less important question. No one can tell a month in advance when an election will take place. Then the ministers, who are rigidly excluded from the Legislatures in your system, not only may, but they must, have a seat in the Legislature in ours.

There is a marked difference in the relative importance of the two houses of Parliament in Canada and the two houses in the Provincial Legislatures (where such exist) on the one hand, and the two branches of Congress or State Legislatures on the other. This may be in part due to the fact that members of the Senate in the United States are elected for a limited term, while in Canada Senators are nominated by the Governor-General, i. e., by the administration for the time being in power at Ottawa, and Legislative Councillors who, in the two Provinces which have second chambers, correspond in the provincial field to Senators in the Dominion, are nominated by the Lieutenant-Governor, i. e., by the local administration (we have only two Provinces which have a second chamber in their Legislatures and have found the monocameral system to work well).

It is the House of Commons, the Legislative Assembly, which counts in Canada—the Senate, the Legislative Council, is but the fifth wheel to the coach. The case is rare in which the second chamber ventures to defeat a bill passed by the popular and elected House, this happening only shortly after the advent to power of a new administration of a different party from its predecessor.

If the Senate of the United States were to omit to defeat an administration measure now and then, "chaos (or is it cosmos?) were come again". In the case of a clash between the houses in Canada the Senate must necessarily give way in the long run to the popular House—not so in the United States where Senate and House alike are elected.

Perhaps the most striking difference in the two systems arises

from the fact that your President is elected for a fixed term, as are your legislators. A President may be universally disliked and distrusted, but short of impeachment there is no way of removing him—with us if the Prime Minister (who and not the Governor-General corresponds in fact, if not in theory, to your President) loses the confidence of the House of Commons he must resign. He may, indeed, if a new election be granted him, succeed in obtaining at such election a majority in the House of Commons: if so he is saved—but he must have the House at his back or step out and make room for another. So in the Provinces in like manner.

I shall now give a few examples to shew how in practice the written Constitutions in the United States have hampered the free action of legislation, with illustrations from our legislation.

The Federal Constitution provides that no State shall pass any law impairing the obligation of contracts—this provision has had far-reaching effects. A charter granted for a college, e. g., is considered a contract. For example, in 1769 the King, George III, granted to the Trustees of Dartmouth College in New Hampshire a charter of incorporation as a private charitable institution. After the Revolution—in 1816—the Legislature of the State of New Hampshire passed an act taking away from the trustees the government of this college and vesting it in the executive of the State—in other words changing the college from a private to a State institution. The act while continuing the trustees as a corporation as Trustees of Dartmouth University, purported to form a new body called a Board of Overseers, of whom the President of the Senate and the Speaker of the House of Representatives of New Hampshire, the Governor and Lieutenant-Governor of Vermont, were ex-officio members—and to this Board of Overseers was given the power of confirming or vetoing the acts of the trustees relating to the appointment and removal of president, professors, and permanent officers, the determination of their salaries, the establishment of professorships, the erection of new buildings, etc. The Legislature later on in the same year passed another act making it an offence for any one to act as president, professor, etc., except in conformity with the act just named. One Woodward had been Secretary-Treasurer of the corporation before the passing of the acts, but he appar-

ently took sides with the Legislature (since he was removed by the Trustees of Dartmouth College before the last act) and he was re-appointed by the Trustees of Dartmouth University organized under the new acts. The old board brought an action against him for taking possession of the books of their records. It will be seen that the simple question was: Had the new corporation of Trustees of Dartmouth University any power? And that depended upon whether the acts of the legislature were valid. The Supreme Court of New Hampshire decided that the Legislature had not exceeded its authority, and so dismissed the action: and an appeal was taken to the Supreme Court of the United States. The case for the old board was argued by the celebrated Daniel Webster and the Supreme Court decided that the charter was a contract. The Chief Justice, the well-known John Marshall, says "It can require no argument to prove that the circumstances of this case constitute a contract." Then the court proceeded to hold that this charter was a contract of the kind protected by the Constitution, and that the Legislature had no right to change it in any way.

In Upper Canada a Royal Charter was obtained from George IV in 1827 for the University of King's College at or near the town of York (now Toronto). It contained provisions that the Governor should be Chancellor, the Anglican Bishop of Quebec should be the Visitor and that the Archdeacon of York should be President by virtue of their offices, that all members of the Council should be members of the Church of England and Ireland, and that students in divinity must also take the same oaths as were required at Oxford. The Legislature of Upper Canada in 1837 took away the visitorship from the Bishop, the presidency from the Archdeacon and abolished all religious tests whatsoever.

That, however, was nothing to what was done twelve years later—in 1849 much of the charter was repealed and amended, the whole constitution was changed, the name became "The University of Toronto", the Chancellor elective, and he was not to be an ecclesiastic, a minister of any faith. The President was to be appointed by the Provincial Administration, the faculty of divinity was abolished, a Senate formed, and the property of the University vested in a new board. No doubt King's

College was a small college and had those who loved her, but no dramatic eloquence even of a Daniel Webster would have induced a Canadian court to hold that the Legislature had exceeded its powers in such legislation. And many such instances are to be found, for example in New Brunswick—"the University of New Brunswick"—in Nova Scotia, and elsewhere. So in the Dominion, but the present year, the relation of the Queen's University to the Presbyterian Church has been radically changed.

In the provision that no State may pass a law mpairing the obligation of contracts, "contracts" is considered a very extensive and comprehensive term. When the State of Georgia had granted certain land, this grant was called a "contract" by the Supreme Court (Fletcher v. Peck, 6 Cranch 87, 136) and an act of the State Legislature annulling the grant upon the expressed ground of fraud was held to be unconstitutional. In Canada no one doubts that the decision would have been the other way. In 1897 and 1899 certain water rights were given on and near the Kaministiquia River to one J., these were in 1902 taken away from him and restored in 1904—all by the Province of Ontario.

After a State has agreed to grant lands to a company upon conditions, and the grantee has fulfilled the conditions of the grant and so earned the lands, it is not competent to pass further legislation that the lands shall not be conveyed to the company except upon a further condition: De Groff v. St. Paul &c R. R. Co., 23 Minn. 144. In Ontario, a certain company claimed to have fulfilled all the conditions necessary under the statute to entitle it to the grant of certain mineral rights. The Government disputed the right of the company: and made a sale of these rights to another company. An action was brought, but pending the action legislation was passed declaring the latter company entitled. The action came on for trial before myself and I declined to pass upon the question whether the requirements of the statute had been fulfilled by the original company, as I considered this quite immaterial. I held that even supposing the first-named company owned the land, the Legislature had the power to take it away and give it to another. This view of the law was approved by the Court of Appeal, and the Judicial Committee of the Privy Council. The following language was used:

"If it be that the plaintiffs acquired any rights . . . the Legislature had the power to take them away. The prohibition 'Thou shalt not steal' has no legal force upon the sovereign body": Florence v. Cobalt (1908), 18 O. L. R. 275. This decision made some commotion: and it was attacked by some who should have known better. They based their attack chiefly on the provisions of Magna Charta—not knowing or not appreciating that a British Legislature has the power to repeal even Magna Charta so far as it affects the territory subject to such Legislature—and, indeed, most of Magna Charta is repealed in Ontario: Smith v. London (1909), 20 O. L. R. at pp. 140, 141.

An agreement by a State Legislature to bind its own hands by a grant so as to preclude it from exercising its sovereignty in that regard in the future has been held by the Supreme Court to be valid in certain cases of taxation and exclusive privileges. Whether the police power can be thus alienated is a different and a difficult question. But in Canada, "the Legislature has no power to control by anticipation the actions of any future Legislature or of itself": Smith v. London (1909), 20 O. L. R. at p. 142.

I have already indicated the powers of a Canadian Legislature in respect of private property. It may be said broadly that a Provincial Parliament has the power to say that Blackacre, now the property of A, shall hereafter be the property of B—and so it will be—and that without the necessity of making compensation. The whole learning as to eminent domain is of no interest in Canada. The Legislature may, indeed, direct compensation to be paid; but that is in no sense necessary.

In many jurisdictions, e. g., New York, Michigan, Alabama, it has been considered that the State cannot authorize owners of mill-privileges to expropriate the land above to increase the head. In Ontario, we have long had such legislation, and no one has doubted its validity. Compensation is, indeed, directed to be paid: but that is not at all necessary for the validity of the statute.

A statute of New York authorized any person to take into his custody any animal trespassing upon his lands and give notice to the justice or a commissioner of highways of the town, who should proceed to sell the animal after posting notices. This was held invalid in Rockwell v. Nearny, 35 N. Y. 307. In Ontario

by R. S. O. c. 272, anyone may distrain a trespassing animal on his land. If this animal be a horse, cow, pig, etc., he may either take it to the public pound or retain it, giving notice to the clerk of the municipality. After certain notices the animal may be sold if not redeemed or replevined.

The State Legislature cannot authorize the compulsory extinguishment of ground rents on payment of a sum in gross: Palairet's Appeal, 67 Pa. St. 479. But in Prince Edward Island, lands which had been in the possession and ownership of "Proprietors" and their predecessors in title for many years were taken from them by the Act of 1874 upon payment into the Treasury by the Government of a lump sum, determined by commissioners. This, indeed, is not unlike "eminent domain", since the act is passed for "the contentment and happiness of the people", and there was "no reasonable hope of" the Proprietors "voluntarily selling their Township lands to the Government at moderate prices."

In Quebec from the first, the land was held in seigniority, the seignior (generally a noble) had under him the *censitaires* or tenants, "habitants" they called themselves: the habitant as "censitaire" (tenant—the words are not quite synonymous) was under many feudal obligations, familiar to readers of Blackstone—for example, he was bound to take his grain to be ground at the seignior's mill, and to pay for such grinding. If he went to another mill, that did not relieve him from paying his seignior all the same. And his punishment might be even more severe, for in one recorded judgment, a habitant who took grain to another mill than his seignior's was decreed to forfeit to the seignior not only the grain but also the vehicle in which it was carried. If a habitant, being the feudal inferior, desired to dispose of the land which he held, he was obliged to pay a substantial part of the purchase money to the seignior; and worse, the seignior might himself take the land within forty days of the sale. He was liable to the corvée or forced labor, for his seignior, as in France; he must give the seignior one fish out of every dozen of those caught in seigniorial waters; wood and stone might be taken from his land by the seignior to build or repair manor-house, church or mill. Some few seigniors had also a seigniorial oven to which his censitaires were bound to take their bread to be baked.

In 1854 the then Province of Canada directed the value of all these rights to the seignior to be determined by commissioners appointed by the Governor, and upon their report being filed, and notice thereof published in the Official Gazette, the habitant was relieved of all duties, etc., except the fixed yearly rent, and thereafter held his land in *franc-aleu roturier*—at his option he might pay a lump sum once for all.

In this instance all the feudal duties were turned into a money payment—yearly indeed unless the tenant paid a lump sum. No one doubts that when the Legislature said that a lump sum might be paid instead of the *rente constituée*, it was perfectly valid legislation.

In the Imperial Act of 1869, by which the Irish Church was disestablished, there was a provision taking away all right of advowson or power of appointment to a church. Such right becomes effective only at certain—or rather uncertain—intervals—but the Parliament took it away entirely and directed the former owner if he applied for compensation within three years to be paid a lump sum fixed by commissioners: see Frewen v. Frewen (1875), L. R. 10 Ch. Ap. 610.

In the United States it is said the Legislature cannot validate an invalid trust or will: Hilliard v. Paul, 10 Pa. 81, 326, or give land absolutely to one who under the will received it under a restraint against alienation: Spink v. Brown, 61 Pa. St. 327; Atter's Appeal, 67 Pa. St. 341. In Ontario Mr. Goodhue left a perfectly valid will, the residuary estate to accumulate during the lifetime of his widow, and directed that if any of his children died during the lifetime of the widow, their children should take their parents' share. This did not suit the children of the decedent: they wanted their share at once and they executed a deed whereby each of them was to have his share at once—in other words they tried to take away the possibility which the will created in favour of grandchildren. The Legislature in 1871 declared the deed valid—and the court was forced to uphold the transaction: Re Goodhue (1872), 19 Gr. 366. The court did not doubt the power of the Legislature to pass statutes wherein "from oversight or any other cause provisions should be inserted of an objectionable character, such as the deprivation of innocent parties of actual or possible interest by retroactive legislation."

Drainage of agricultural lands across the lands of others is a taking of private property for private use and in violation of the Fourteenth Amendment: Re Tuthill, 163 N. Y. 133, 49 L. R. A. 781. We have a whole series of acts allowing this very thing, and no Fourteenth Amendment stands in the way.

Not far removed from the right of property comes the right to bring an action. It is said that Congress has no power to protect parties assuming to act under the authority of the central government during the civil war by depriving persons who had been illegally arrested of all redress in the courts: Griffin v. Wilcox, 21 Ind. 370; Johnson v. Jury, 44 Ill. 142.

The Act of Congress providing "that any order of the President or under his authority, made at any time during the present rebellion, shall be a defence in all courts to any action or prosecution pending, or to commence for any search, seizure, arrest, or imprisonment, made, done or committed . . . " was, accordingly, held to be invalid.

In Canada we have had statutes of indemnity, e. g., in 1838, after the "Rebellion" an act was passed (1 Vic., c. 12) which recited that before and during the "insurrection" it became necessary for Justices of the Peace, officers of the militia and others in authority in the Province, and also for loyal subjects, to apprehend persons charged or suspected of joining in the insurrection. The act then provided that all proceedings brought for such acts should be void, and the persons who had committed them indemnified—all such proceedings were to be stayed, and if the plaintiffs went on they should be liable for double costs. No one had the slightest idea that this act was not perfectly valid.

So in Ireland, a similar act was passed after the Rebellion of 1798; and also in Cape Colony in 1836, 1847, and 1853; in Ceylon in 1848; in St. Vincent in 1862 and in New Zealand in 1865 and 1867. And in Jamaica after the Rebellion of 1865, the Legislature passed an act of indemnity which had the effect of preventing the prosecution of actions against Governor Eyre.

It is, indeed, said that the people of a State, by amendment of their Constitution, may validly take away rights of action and other rights not thereby imposing a punishment or impairing the obligation of a contract. This was done by the State of Missouri

and others; all rights of action for anything done during the war by Federal or State troops were taken away: Dupman v. Shetel, 41 Mo. 184; 8 Wall. 645.

Some of the differences between the two countries depend upon a principle to which the courts in the United States pay much respect—the principle of equal rights. One judge exclaims "Can it be supposed for a moment that if the Legislature should pass a general law and add a section by way of proviso that it should never be construed to have any operation or effect upon the . . . . rights, etc., of A. L. or J. G., such a provision would receive the sanction or even the countenance of a court of law?" Lewis v. Webb, 3 Mo. 326.

The Dominion Act of 1903, 3 Edw. VII, c. 21, gives jurisdiction to the Exchequer Court of Canada to order the sale of any railway at the instance of the Minister of Railways, or any creditor, appoint a receiver, etc., but "Sec. 8 of this Act shall not apply to or authorize proceedings against the C. O. Railway . . . "

While in cases of succession duties an arbitrary statutory exemption is sustainable: State v. Furnell, 39 L. R. A. 170, if such an arbitrary exemption is applied only to estates lower in value while those which are larger have no exemption at all, this is void and invalidates the whole statute: State v. Ferris, 53 Ohio St. 34: 30 L. R. A. 218—but this seems to be doubted in other courts: Tennessee and Massachusetts, 26 L. R. A. 259; 28 L. R. A. 178. In Ontario, all estates under ten thousand dollars are absolutely exempt—as are all passing to certain relatives under one hundred thousand dollars—and the larger ones have no exemption.

A statute of a State providing for service upon the agent of a non-resident doing business in the State has been held to be void: Cabanne v. Graf, 92 N. W. 461. In Ontario, every non-provincial company before procuring a license must have an agent within Ontario upon whom service may be made: and every person who within Ontario transacts or carries on any of the business or any business for any corporation whose chief place of business is without Ontario, shall for the purpose of being served "with writ of summons" be deemed the agent thereof: Con. Rule 159 (b).

A statute attempting to restrict the right of banki[illegible]

porations is bad: State v. Scangal, 15 L. R. A. 474; 44 Am. St. 756, although apparently the restriction is good if the business be insurance, at least in Pennsylvania: Commonwealth v. Vrooman, 164 Pa. 306; 25 L. R. A. 250. By the Dominion Act, R. S. C. (1906) c. 29, Secs., 156, 157, it is provided that every one who uses or assumes the title of "bank", "banking company", "banking house", "banking association", or "banking institution" without being authorized to do so is guilty of an offence rendering him liable to a fine of one thousand dollars, or imprisonment for five years, or both. And only incorporated companies are eligible for authorization.

In the United States, it seems that an act requiring persons paying less than twenty-five dollars in taxes to pay a license fee will be held bad: State v. Mitchell, 53 Atl. 887. And a regulation limiting to transients only requirement of a license is equally obnoxious to equality: McGrand v. Marion, 98 Ky. 673: Kinsely v. Cotterel, 196 Pa. St. 614. But such regulations are of daily occurrence in Canada.

An act providing for raising money to pay bounties to private producers of beet sugar is invalid: Michigan Sugar Co. v. Auditor General, 124 Mich. 674. We until this year paid bounties to private producers of steel, pig-iron, etc.—and bounties to private producers of beet sugar are not unknown.

No city, it is said, can be allowed to raise taxes with which to aid manufacturing establishments: Parkersburg v. Brown, 106 U. S. 687: Cole v. La Grange, 113 U. S. 1. We do it every day and in most, if not all, of the cities and in many of the towns and even villages of Ontario.

In the United States it is decided that taxes must be for a public purpose and while the support of a State University is a public purpose, the creation of free scholarships and allowances to needy students is not, even though these should be granted after public and competitive examination: State v. Switzer, 143 Md. 287. We would have no difficulty in such a case.

In Illinois and New Hampshire it seems that owners of property cannot be compelled to keep the sidewalk opposite their property clear of snow: Gridley v. Bloomington, 88 Ill. 554. State v. Jackman, 69 N. H. 318; 44 Pa. 438. But in Toronto many a citizen has found his way to the police court because he has neglected to obey an ordinance to that effect.

A railroad apparently cannot, with you, be made liable for stock killed by it in the absence of negligence on its part. Jenson v. Union Pac. R. Co., 21 Pac. Rep. 994. By our Railway Act, sec. 294 (4), when any stock at large, whether upon the highway or not, gets upon the property of the railway and is killed or injured by a train, the railway must pay unless they prove that the stock got at large through the negligence of the owner. And sec. 298 provides that the company must pay for damage to crops, etc., caused by fire, negligence or no negligence. Not wholly dissimilar legislation has been passed in several States, and apparently held good. Fraser v. Pere Marquette (1906), 18 O. L. R. 589. And also in the case of passengers and goods. Chicago, &c., v. Qernocke, 82 N. W. 26.

Some differences depend upon the hypothesis that the Legislature is an agent, *delegatus:* and of course, Bentham or no Bentham, *delegatus non potest delegare* For example, a State Legislature cannot authorize a board of health to make general rules: State v. Burdge, 95 Wis. 390. Nor can it leave to an official finally to determine what shall be done to make factories and workshops sanitary: Schaezlein v. Cahaniss, 135 Cal. 466, or the extent of expropriation for waterworks; Stearns v. Barre, 73 Vt. 281.

In the Canadian "constitution", Parliament and Legislatures are not considered *"delegatus"* at all. Not even delegates of the Imperial Parliament at Westminster, from whose statute the Canadian Legislative bodies derive their powers—the highest court in the Empire has said "They are in no sense delegates of or acting under any mandate from the Imperial Parliament . . . . the Provincial Legislature having . . . . the authority to impose imprisonment with or without hard labour, had also power to delegate similar authority to the body which it created called the License Commissioners. . . . " Hodge v. The Queen, 1883, 9 A. C. at pp. 132, 133, 134. "It was argued at the bar that a Legislature committing important regulations to agents and delegates, effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them,

are matters for each legislature and not for courts of law to determine'', ibid, p. 132. In fact it may be said generally that anything a Legislature can do itself, it can depute to another subordinate body to do. I consequently do not give particular instances or further pursue this subject.

Where courts have given an interpretation to the words of a statute, it is not open to the Legislature to put another construction upon these words so as to have a retroactive effect: Greenough v. Greenough, 11 Pa. St. 489. No such limitation of the power of Parliament or Legislature is thought of in Canada. Moreover there are many statutes (e. g., in insurance) which are expressly made applicable not only to future but also to existing contracts.

The Legislatures in the United States cannot validly provide that cases pending in the Court under an existing law shall be dismissed: State v. Adams, 44 Mo. 570. In 1909 the Legislature of the Province of Ontario passed a statute, 9 Edw. VII, c. 19, which by sec. 8 provided that every action theretofore brought wherein the validity of a certain contract or any by-law passed or purporting to be passed, authorizing its execution by a municipal corporation, was attacked should be ''forever stayed.'' One of such actions came on for trial before me—the evidence had been taken before the passing of the act but decision not yet given when the act was passed. I said (Smith v. London (1909), 20 O. L. R. at p. 142) ''This action it is plain comes within the letter as well as the spirit of this sec. 8. The Legislature has said that this action shall be stayed. My duty is 'loyally to obey the order of the Legislature,' the action is accordingly stayed.

''While the wording of the statute is that the action shall be 'forever stayed', the Legislature has no power to control by anticipation the actions of any future Legislature or of itself; it may be that this legislation may be repealed . . . . the result is that the stay ordered by the statute has the effect of causing the court to retain the action with no proceedings to be taken therein unless and until the legislation is in some way got rid of.''

This decision was affirmed on appeal, an appeal hopeless from the very first.

We may go even further and say with perfect confidence that

a Provincial Legislature may, in matters of private rights, oust the court altogether and make it a mere *roi faineant* in that regard.

"It is not in my judgment doubtful that the Legislature of the Province has the power to say that any question respecting property or civil rights shall be decided in any way the Legislature shall see fit . . . . that the Legislature has supreme power within the limits of subjects allotted to it to pass such legislation as it sees fit and such legislation must be given effect to by this and every other court. And if the Legislature has in fact said that the true boundary between the two adjoining lots is to be determined by three farmers or by a land surveyor, it is my duty loyally to obey the Legislature and to stay my hand: the Legislature has the legal power—and that is all I may concern myself about—to say that His Majesty's Court shall not determine the property rights of His Majesty's subjects . . . . but that such are to be determined by some other tribunal or by some person named." Delamatter v. Brown (1908), 13 O. W. R. 58, at pp. 62, 63.

In the case of Smith v. London it was held that the Legislature might declare a contract valid which theretofore had been invalid. And this method is frequently resorted to. A municipality has passed by-laws granting a bonus to a railroad or other enterprise, perhap · issued bonds for the amount of the bonus: some question arises as to the legality of by-law or bond issue. An act is procured from the Legislature, and thereafter no one can set up illegality in what the Legislature have declared legal.

The boy said "What mother says is so, if it isn't so". We say "What the Legislature say is legal, is legal if it isn't legal."

An order to State officers not to engage in politics and not to make public speeches is void. Lonthan v. Conn., 79 Va. 196. Our Canadian practice is to continue a man in public office for life, but if he engages in politics or makes public speeches, he is dismissed, at least when the other party come into power—and no one doubts that such an order as has been held void in the United States is perfectly valid with us.

Then as to the Dominion and Provincial Courts. The construction put upon the statutes of a State by the State courts is generally followed by the Supreme Court of the United States.

The Supreme Court of Canada does not consider itself at all bound by the Provincial Courts. In a case tried by myself in which I gave judgment for the plaintiff, the whole question was one of the interpretation of an Ontario statute—the Court of Appeal for Ontario sustained my judgment. In the Supreme Court, the two judges who had come from Ontario agreed in that interpretation, but three judges—one from Quebec, one from Prince Edward Island and one from British Columbia—took another view, and the appeal was allowed. The Judicial Committee, indeed, restored the original judgment: Thompson v. Equity Ins. Co. (1910), A. C. 592; (1909), 41 Can. S. C. R. 491.

But I think I have given sufficient instances now to illustrate the radical difference in many respects of the two Constitutions.

I. In the United States the President and the Governors of the States (speaking generally) have as much power as George III, and in some respects more—the Governor-General and the Lieutenant-Governors, less than George V.

II. Times and seasons are set in the United States for change of legislation, none in Canada.

III. The Government of the United States can claim no powers which are not granted by the Constitution—it is a government of enumerated powers: the Dominion of Canada has all the powers not granted to the Provinces.

IV. The Constitution of the United States contains a hard and fast standard set by people of one generation for their successors: that of Canada may be changed in a day: *Littera scripta manet.*

V. In the United States

> The Moving Finger writes, and, having writ
> Moves on: nor all your Piety nor Wit
> Shall lure it back to cancel half a line,
> Nor all your tears wash out a word of it.

(Perhaps you would prefer the Latin version—here it is

> It digitus, cerae scribuntur, scriptaque durat
> littera: tu sapiens sis licet atque pius
> "dimidium dele" frustra obtestabere "versum",
> non flet lacrimis ulla litura tuis.)

No interpretation by the courts of the meaning of the words of the statutes, can the Legislature correct: no contract created by legislation, however unwise, can be cancelled: no grant, however improvident, can be recalled: no action based upon existing law can be stayed or dismissed: no gain, however ill-gotten, can be taken away from one who obtained it by legal means however scaly: no college can be brought under such governance as the whole State may desire and perhaps need, if it can appeal to some old charter or grant.

In the United States the courts are supreme: in Canada, the people through their representatives—in the one country a few men say to the legislating bodies, "Thus far shall thou go and no further', in the other the legislating bodies say to the courts, "Thus far and thus shalt thou go and no further or otherwise."

In the United States, half a dozen men sitting up in a little cock-loft can paralyze the activity of a Senate and House—may say that a measure imperatively called for in the public interests cannot be validly enacted; and the legislators, the people, are helpless—that is called Republicanism, democratic government; and there is searching of soul and shaking of heads, if not gnashing of teeth, when anyone suggests that the people be asked if that little coterie have correctly interpreted the popular will formerly and formally expressed in a State Constitution. In Canada should the court fail to apprehend the real intention of an enactment, any government which can command the support of the people can correct the error.

Paley, when speaking of a view held by some of the Constitution of England, says "These points are wont to be approached with a kind of awe: they are represented to the mind as principles of the constitution, settled by our ancestors, and being settled to be no more committed to innovation or debate, as foundations never to be stirred, as the terms and conditions of the social compact to which every citizen of the State has engaged his fidelity by virtue of a promise which he cannot now recall." Is not that the point of view, the feeling of the American? Paley adds "Such reasons have no place in our system."

The framers of the Constitution of the United States have used every endeavor to ward off what they consider the worst

of all governments, an unbalanced democracy which is supposed to be necessarily pregnant with a democratical tyranny (I use the words of Erskine) thinking (to use the words of Locke) "that the people being ignorant and always discontented, to lay the foundation of government in the unsteady opinion and uncertain humour of the people, is to expose it to certain ruin." It is in the power of the people to change the constitution indeed, but not at once—and the "sober second thought" is what is so often spoken of and appealed to. Is it always certain that the first thought is wrong: and the second thought right?

With Burke I say "If you ask me what a free government is, I answer, That it is what the people think so, and that they and not I are the natural, lawful and competent judges of this matter." And so I leave it.

No doubt the citizens of this Republic will say—what a barbarous country is Canada! the courts are not secure in their jurisdiction, the interpretation put upon statutes by the court may be reversed by the Legislature, any man may be deprived of his property without due course of law—why even a legislator after he has been elected does not know how long he may continue such. Surely property must be insecure, enterprise and industry at a discount, the courts an object of contempt, the Government an object of awe not unmixed with terror!! What a country for a white man to live in!

So a Canadian who did not happen to know better might exclaim, Why, what's the use of a Senate and House of Representatives or House of Assembly, when their hands are tied by the letter which killeth, when they cannot even "boss" a court? What kind of a country is it where no matter how offensive and discreditable a government may be you cannot get rid of it till a time fixed beyond control? What a paper-governed, court-ridden country!!

And yet, have we not here an illustration of the saying "It is not so much the form of a constitution as the spirit in which government is carried on, not so much the law as the men who administer it, which count"?

In your land as in mine the government and legislators respond pretty well to public sentiment—a little more quickly, a little more slowly—both lands get the government they deserve. At odd times the courts will with you check for a while useful

legislation, but it gets enacted at last some way or another. A lawyer trained in the interpretation of constitutions—the "Philadelphia lawyer" of proverbial note—can see much difference between "tweedledum and tweedledee".

> A hair perchance divides the false and true.
> Yes: and a single Alif is the clue—
> They're sure to find it—to distinction clear
> And peradventure to reversal too.

as Omar does *not* say. And a method can always be found without giving the court or the Constitution too cruel a jolt for giving the people what they really demand and insist upon.

In Canada nobody is at all afraid that his property will be taken from him; it never is, in the ordinary case. Our people are honest as peoples go, and would not for a moment support a government which did actually steal—a new government would be voted into power and the wrong righted. We will not submit to have our great public works delayed by cranks or the litigious, but even a crank or litigious person must be paid a full price for his property—our courts I venture to think are as much respected—(excluding myself) are as worthy of respect—as those of any country in the world; many of our best men, men of high type, seek election to the House of Commons and the Legislatures—and if any government in the United States could be treated to more railing accusations and with more contempt than Canadian governments are by their political opponents, I should marvel at it. An American feels himself at home at once in Canada, a Canadian crossing the border does not feel that he is entering a foreign or a strange land—neither can notice any difference in the law any more than in the language or in the habits of the people. Once he escapes the custom-house either feels himself a native—unless he is a fool either by nature or through misplaced or spurious patriotism.

Indeed, we are in all but the accident of political allegiance, one people. True the Union Jack and Old Glory have the colours red, white, and blue differently arranged—but they are the same red, white, and blue.

> Of precious blood its red is dyed
> The white is honour's sign
> Through weal or ruth its blue is truth,
> Its might the power divine.

As we are of the same blood, our aims are the same, justice to all under the law, good will to all men, peace and righteousness. With these aims in common we are working and shall work out our destiny side by side and in much the same way, an example and a blessing to humanity.